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IN THE

Supreme Court of the United States

OCTOBER TERM, 1990

JAMES C. PLEDGER, COMMISSIONER OF REVENUES OF ARKANSAS, *et al.*,
Petitioners

v.

DANIEL L. MEDLOCK, *et al.*,
Respondents

DANIEL L. MEDLOCK, *et al.*,
Petitioners,

v.

JAMES C. PLEDGER, COMMISSIONER OF REVENUES OF ARKANSAS, *et al.*,
Respondents.

On Writ of Certiorari to the Supreme Court of Arkansas

BRIEF AMICUS CURIAE OF THE CALIFORNIA CABLE TELEVISION ASSOCIATION IN SUPPORT OF DANIEL L. MEDLOCK, *et al.*

SPENCER R. KAITZ
President
ALAN J. GARDNER
Vice President
Regulatory & Legal Affairs
CARRINGTON F. PHILLIP
Assistant General Counsel
JEFFREY SINSHEIMER
Director of Regulatory Affairs
CALIFORNIA CABLE TELEVISION ASSOCIATION
4341 Piedmont Avenue
P.O. Box 11080
Oakland, California 94611
(415) 428-2225

FRANK W. LLOYD, III *
DIANE B. BURSTEIN
CAROLINE O. ROBERTS
MINTZ, LEVIN, COHN, FERRIS, GLOVSKY & POPEO, P.C.
1825 Eye Street, N.W.
Suite 1200
Washington, D.C. 20006
(202) 293-0500
Counsel for Amicus Curiae California Cable Television Association

November 15, 1990

* Counsel of Record

WILSON - EPES PRINTING CO., INC. - 789-0096 - WASHINGTON, D.C. 20001

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STATEMENT OF INTEREST OF AMICUS CURIAE

The California Cable Television Association ("CCTA") submits this brief as *amicus curiae* in support of Daniel L. Medlock, Community Communications Company and the Arkansas Cable Television Association.[1]

CCTA is a trade association representing cable television system operators that provide cable television serv-

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[1] Consistent with Sup. Ct. R. 37.3, both parties have given CCTA their consent to the filing of this brief.

ice to over five million California residents. CCTA brings information to the Court concerning the extent and impact of discriminatory taxation of cable television in California. This *amicus* brief will illustrate that resolution of the issues before this Court in these cases will have an impact outside of the state of Arkansas, and well beyond the issue of discriminatory sales taxes.

Cable operators in California are subject to different, but equally invidious, forms of differential taxation. Property taxation of cable television systems and utility user taxation of cable television subscribers are currently the subject of litigation in the California state courts. CCTA has filed *amicus* briefs in California proceedings involving discriminatory taxation of its members.

CCTA is also a central clearinghouse for information on programming provided by its member cable operators, much of it relating to the core concern of the First Amendment. This programming is threatened by the imposition of discriminatory taxes. CCTA's experience puts it in a unique position to bring to this Court evidence of the effect of discriminatory taxation on cable speech.

SUMMARY OF ARGUMENT

In order to decide this case, the Court need not decide all of the questions as to cable television's First Amendment status left open in its 1986 *Preferred* decision.[2]

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[2] *City of Los Angeles v. Preferred Communications*, 476 U.S. 488 (1986). In a concurring opinion, Justice Blackmun, joined by Justices Marshall and O'Connor, noted: "Different communications media are treated differently for First Amendment purposes," and that, with respect to cable television, the Court had yet to have a factual record to determine whether the characteristics of cable television "make it sufficiently analogous to another medium to warrant application of an already existing standard or whether the characteristics require a new analysis." *Id.* at 496. Newspapers, magazines, and cable television are analogous in that they are either purchased directly or by subscription by their readers or viewers, and unlike television and radio, are not subject to spectrum scarcity.

For the purposes of this case, the Court need only find that cable television is a medium engaged in expressive activities of the type the First Amendment was designed to protect, that it is subject to discriminatory taxation, and that the discriminatory treatment of cable television in the particular instance before the Court has no basis in a valid governmental purpose other than the mere raising of revenue.

CCTA contends that, based on the experience of cable operators in California, precisely the same vices of potential speech restraint that were present in the *Minneapolis Star*[3] and *Arkansas Writers' Project*[4] cases are inherent in the discriminatory taxation of cable television. The Court should therefore hold the principles articulated in these cases to be fully applicable to discriminatory taxes against cable television.

ARGUMENT

I. CALIFORNIA CABLE TELEVISION SYSTEM OPERATORS ENGAGE IN SPEECH ACTIVITIES PROTECTED BY THE FIRST AMENDMENT

While this Court has not yet delineated the precise limits of the First Amendment protections extended to cable television, it is clear that cable operators exercise "a significant amount of editorial discretion regarding what their programming will include."[5] Operators of cable television systems in California engage in three types of speech activities over their cable television facilities: (1) as originators of expression, (2) as distributors of the expression of others, and (3) as facilitators for access users. In all of these roles the cable sys-

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[3] *Minneapolis Star and Tribune Co. v. Minnesota Commissioner of Revenue*, 460 U.S. 575 (1983).

[4] *Arkansas Writers' Project, Inc. v. Ragland*, 481 U.S. 221 (1987).

[5] *FCC v. Midwest Video Corp.*, 440 U.S. 689, 707 (1979).

tem operator engages in expressive activities traditionally protected by the First Amendment.

A. Editorial Discretion Exercised By California Cable Systems

California cable television system operators make editorial choices among a wide variety of broadcast signals and satellite delivered networks designed specifically for cable system use. California cable systems select local broadcast signals, choosing among the three major network affiliates, Fox affiliates and other commercial independents, and public television stations in the local area.[6] California cable operators also decide whether to import broadcast signals that cannot be received over the air with ordinary home antenna equipment.[7]

California cable operators also select from among the more than 100 satellite-delivered program networks created specifically for the cable industry.[8] Nearly all of the over 5 million California cable subscribers have access to twenty-four hour news from CNN and coverage of the United States Senate and House of Representatives from C-SPAN as part of their basic cable package.[9]

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[6] Since the 1985 D.C. Circuit decision striking down the FCC's former local broadcast signal "must-carry" rules, these editorial decisions are solely those of the cable operator. *See Quincy Cable TV, Inc. v. FCC*, 768 F.2d 1434 (D.C. Cir. 1985), *cert. denied*, 476 U.S. 1169 (1986); *Century Communications Corp. v. FCC*, 835 F.2d 292 (D.C. Cir. 1987), *cert. denied*, 486 U.S. 1032 (1988).

[7] These signals, such as "superstations" WTBS, Atlanta, or WGN, Chicago, are brought into the cable operator's service area either by microwave or by satellite.

[8] *See Television & Cable Factbook* at C-1 (1990 ed.) (10 pay, 70 basic, and 27 sports network programming services available to cable systems.) *See also Cablevision*, June 18, 1990, at 84. (Twenty-four satellite-fed services have been announced for introduction over next 24 months.)

[9] Two other national networks planning to cover legal affairs and the courts will also soon be available to California operators.

A cable television system operator's selection of programming involves a classic editorial function protected by the First Amendment. The fact that the expression may in some cases be originated by another party does not remove the First Amendment protection that these editorial decisions usually enjoy. The *Los Angeles Times* or *San Francisco Chronicle* is not considered entitled to less First Amendment protection when it publishes an article as reported by the Associated Press, or the opinion of a syndicated columnist. A broadcaster is no less protected when it selects network or syndicated programming.

Selection of Cable News Network, Black Entertainment Television, or The Disney Channel and rejection of another service competing for limited channel space reflect conscious editorial choices by cable operators. Cable operators carefully review the program networks they carry and, over time, some are dropped and others added based, in part, on their content. Seldom do two cable systems in California select precisely the same programs to offer to the public.

B. State and Local Programming Produced Or Transmitted By California Cable Operators

California cable television system operators also produce their own programming and facilitate cablecasting through public, educational and governmental access channels. In addition, there are a number of state and regional networks unique to California. Much of this programming concerns public affairs. Sometimes cable television is the only source of such local information and opinion. To tax an entity creating and distributing this programming in a manner different from competing media, such as newspapers and magazines, without a nexus to a purpose other than the raising of revenue, not only creates a chilling effect on highly valued programming, but also impermissively places the government in the position of handicapping competition in the marketplace of ideas.

1. *CAL-SPAN: California's Public Affairs Network*

In August, 1990, a state version of C-SPAN, "CAL-SPAN," distributed live and taped sessions of the California legislature, its committees and subcommittees to over 2 million California cable subscribers. This test gave California citizens their first video access to the state legislature.

In future months, CAL-SPAN plans to transmit live and taped coverage of both the California Assembly and Senate to homes, schools, and businesses throughout the state. In addition, CAL-SPAN plans to cover proceedings of regulatory boards, executive branch commissions and departments, state supreme court oral arguments, and press conferences. It also plans to disseminate news and analysis.

Even before a regular feed of CAL-SPAN has begun, California cable system operators with over 2 million subscribers have made written commitments to carry CAL-SPAN programming. In many cases, their ability to meet this commitment depends upon their financial ability to upgrade their cable systems in order to create adequate channel capacity to add the CAL-SPAN service to their current full menu of programming.

2. *Regional California News Networks*

California cable operators also carry unique regional news networks. For example, in September 1990, Orange County NewsChannel began 24 hour televised local news, sports, public affairs and cultural events coverage of Orange County, California, where most over the air news comes from television stations that focus on neighboring Los Angeles County.[10] NewsChannel is being operated by Freedom Newspaper Corporation, which owns the *Orange County Register*, a local newspaper. Newspaper

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[10] NewsChannel is currently distributed to almost 200,000 of the 450,000 cable subscribers in Orange County.

staff are helping to write and produce the programming for this channel.[11]

Several California cable operators in conjunction with local broadcasters or newspapers are providing four and one-half minute local news and public affairs inserts each half-hour to Turner Broadcasting's "Local Edition" in its national CNN Headline News cable service.[12]

3. *Local Origination Programming*

Local origination refers to cablecasts produced by the cable system operator. Usually, the cable system operator hires a staff producer and constructs its own studio. In some California communities, cable local origination is highly developed, with daily newscasts that rival local broadcasters' newscasts[13] and with depth of coverage that goes well beyond a "Metro" section of the local newspaper. Yet, as shown *infra*, property taxation of these media is very different in California.

As Orange County continues to develop a separate identity from Los Angeles, cable local origination has become the most logical way to serve the television news needs of the community.[14] California cable operators pro-

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[11] Telecommunications, Inc., a California cable operator, is planning a similarly unique local news service for Contra Costa County in the San Francisco Bay Area.

[12] Over 500,000 subscribers receive local news in this fashion in San Diego, over 250,000 in Orange County, and over 150,000 in San Jose.

[13] Cable operators also program local advertising spots for local and national products and services, including paid political advertisements. These may be run on local programming or inserted into national cable program services. This distribution of commercial speech is also a form of expressive activity.

[14] "Dimension Forum", produced by Times Mirror Cable Television in Orange County, in its third year of production, is a 30 minute weekly public affairs cablecast that features interviews with local officials, community leaders and candidates for local elections. Other local programs include live and tape-delay cablecasts of city

vide essential additional services by covering local political affairs even where broadcasters have regular local news and public affairs programming, such as Los Angeles [15] or San Francisco.[16]

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council meetings and local community events, such as sporting events and parades.

American Cablesystems of California produces several local programs in Orange County concerning political speech, including "The Washington Report," two interview programs that feature local politicians and community leaders, programs on the police department and on educational issues, live broadcasts of all city council meetings, live election coverage including debates, and other debates on community concerns.

M.L. Media Partners/Multivision, an Anaheim cable operator, provides "Newsline 3," a daily local news program covering hard news as well as political issues. It also produces debates and features on politically sensitive issues such as Orange County's proposal to locate a large jail in Anaheim.

Comcast in Santa Ana, a small Orange County cable system with less than 25,000 subscribers, programs two local channels that focus on city issues and events. K Buenavision, a Spanish language service, provides locally-produced public affairs programs targeted towards Santa Ana's large Hispanic population. There is no other local news media information source for Spanish speaking residents.

[15] Over the past two years, Century Cable Television has produced over 200 locally-originated public affairs programs distributed on a regular basis to thirty Los Angeles area cable television companies, with wider distribution when events warranted. Century's regular "Week in Review" program features politicians, press, and pundits discussing issues of community concern. Issue specials spotlight particular questions of public concern. Personality profiles highlight individuals in politics, business and entertainment. Election specials have included candidate profiles, debates, press conferences, interviews, and critiques of political commercials. Century distributed statewide the only video debate between the candidates for state treasurer to all California cable systems. Century recently carried an exclusive interview with Vice President Quayle. *Multichannel News*, Nov. 5, 1990 at 16.

[16] Viacom 6, the local origination channel of Viacom of San Francisco, employs twelve persons who produce local public affairs

California operators air views critical of local government officials on their local origination channels. In fact, one Orange County system has editorialized on its local origination channel against discriminatory property taxes levied against it and other cable television operators.[17]

4. *Public, Educational and Governmental Access*

The most common form of access programming offered by California cable operators is on one or more channels offered on a first come, first served basis for any member of the public to use.[18] Almost two-thirds of California cable operators also make access channels available to local governments for coverage of public, government, and business activities and to local schools for educational programming.[19] These channels provide an outlet for local public expression.[20]

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programming and facilitate public access programming. Viacom 6 has three regular half-hour shows: "Viewpoint," an interview show, features public officials; "City Desk," a live round table discussion, features journalists discussing San Francisco news and events: "Helping Hands," a public health show, with a particular emphasis on AIDS. Monthly shows and specials on the arts, politics, neighborhood viewpoints and earthquake safety have also been produced.

[17] *See infra* pp. 13-17.

[18] Cable operators do not play an entirely passive role in the presentation of access programming. Often the public can use the cable systems' studios to produce programs subsequently carried on the access channels. In addition, many operators provide equipment and training to community and educational groups to facilitate their use of the video medium.

[19] *The Kagan Census of Cable and Pay TV* at 25-49 (Dec. 1989); *Television and Cable Factbook* at A103-A179 (1990 ed.).

[20] The provision of access channels furthers a congressionally-articulated goal of diversity of expression inherent in the First Amendment. *See* legislative history of the Cable Communications Policy Act of 1984, Pub. L. No. 98-544 ("Cable Act"), 1984 U.S. Code Cong. & Admin. News, 4655, 4668. The Cable Act also requires designation of a certain number of a cable operator's chan-

II. CALIFORNIA CABLE OPERATORS ARE BEING SUBJECTED TO DISCRIMINATORY TAXATION

Under California law, the intangible assets of a cable television operator are not taxable. Nonetheless, county assessors have been attempting to levy property taxes on cable television operators based upon assessments that directly subject the cable operators' intangible assets to taxation. This has resulted in facially discriminatory taxation where other First Amendment speakers or non-speech businesses are not taxed by the same methodology. Moreover, Orange County cable operators have been singled out for discriminatory tax treatment because of their status as disfavored members of the media and in retaliation for the Assessor's opinion that the cost of cable programming is excessive. California cable television operators are also subject to discriminatory utility user taxes.

A. Cable Television Systems Are Being Valued For Property Taxation Purposes Differently Than Other Competing Media

Under California law, property taxes are levied annually on each taxpayer's real and tangible personal property. Intangible assets are exempt from property taxation.[21] In 1986, the California Court of Appeals held

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nels for commercial use by "persons unaffiliated with the operator." 47 U.S.C. § 532(b) (Supp. 1990). California operators with 36 or more activated channels must designate from 10 to 15 percent of their channels not otherwise required for use for leased access. Asian, Hispanic, Black and other ethnically-oriented programmers, as well as real estate and other businesses seeking direct access to the public, have leased space from California cable operators.

[21] Cable television systems are stated not to be subject to *ad valorem* property taxes on the value of their intangible assets or rights, including without limitation: "franchises or licenses to construct, operate, and maintain a cable television system for a specified franchise term (excepting therefrom that portion of the franchise or license which grants the possessory interest), subscribers, marketing, and programming contracts, non-real prop-

that a cable operator's right to use the public rights of way constituted a taxable possessory interest.[22] The opinion failed to provide guidance on how to value this unique property right. As a result, many of California's 58 county assessors began to take widely divergent positions on how to value the possessory interest.[23]

In 1988 the California Legislature passed A.B. 3234 in an effort to bring about uniformity and certainty in assessments of possessory interests of cable television operators in the wake of the *Cox* decision.[24] The legislature's action was necessary because certain California cable operators had been singled out for differential treatment for property tax purposes.

Unfortunately, despite the legislation and a California court decision that specifically held that a cable company's right to do business is protected by the First Amendment and not subject to property taxation,[25] some

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erty lease agreements, management and operating systems, a work force in place, going concern value, deferred, start up, or prematurity costs, covenants not to compete, and good will." Cal. Rev. & Tax. Code § 107.7(d) (West Supp. 1990).

[22] *Cox Cable of San Diego, Inc. v. County of San Diego,* 185 Cal. App. 3d 368, 229 Cal. Rptr. 839 (1986).

[23] At least twelve California counties have taken a discriminatory approach to taxing cable television systems over the last several years. Appeals of these decisions are pending in several California courts.

[24] Cal. Rev. & Tax. Code § 107.7(a) (West Supp. 1990). Pursuant to that statute, an assessor may value the possessory interest using any acceptable statutory method. However, "the preferred method of valuation of cable television possessory interest is capitalizing the annual rent, using an appropriate capitalization rate." *Id.* at § 107.7(b)(1). This method avoids the taxation of nontaxable intangible assets. *Id.* at § 107.7(d).

[25] *County of Stanislaus v. Assessment Appeals Board,* 213 Cal. App. 3d 1445, 1454, 262 Cal. Rptr. 439 (1989) ("The levying of

cable operators are still being assessed based upon the full value of their systems as going concerns. As a result, they are being taxed on the value of their intangible assets, rather than solely on the basis of the value of their taxable real and tangible personal property.

Some cable systems are today being taxed at values in excess of $2,000 per subscriber when their tangible asset value, even for a new cable system, approaches $800 to $900 per subscriber. Older cable systems have a tangible asset value of far less: approximately $300 per subscriber. The impact is substantial. Some cable operators already have had to increase a subscriber's bill by approximately $2.00 per month—approximately a 12 percent increase in the average price charged for basic cable service by California cable operators to their customers in 1989.[26] This puts cable television at a competitive disadvantage relative to other media and has had a chilling effect upon the operators' expressive activities. Moreover, it impairs their ability to provide existing or future programming, including local origination and access programming.

Other media businesses or similarly-situated businesses with substantial intangibles or using public rights of way are not taxed in this manner. Although newspapers, radio stations, television stations and motion picture theaters are bought and sold on the basis of cash flow when they change hands, very much like cable, they are not treated like cable television by the assessors. Unlike cable television system operators, their substantial intangible assets are not assessed.

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ad valorem taxes on Post-Newsweek's right to do business as a cable operator would be unique to nonutility taxpayers in California.")

[26] *The Kagan Census of Cable and Pay TV* at 49 (Dec. 1989) (average basic rate in California of $16.70 per month).

A January, 1990 study by Kagan Media Appraisals, Inc. provided startling findings of discrimination.[27] In eleven of twelve counties, on average over a three-year period, non-cable media properties were being assessed at only about 25 percent of sales price while cable television systems were being assessed at an average of 131 percent of sales price. Broadcast properties were assessed at an average of 19 percent of sales price and newspapers at an average of 35 percent of sales price.

The inescapable conclusion is that cable television operators in many California counties are being taxed on the value of a cable business' substantial intangible assets, while other media, including television, radio and newspapers, are not. No California taxing authority has articulated a valid governmental objective for treating cable television differently from other speech media with which it competes, and none exists.

B. Cable Television Operators In Orange County Are Being Taxed In A Discriminatory Manner Based On The Assessor's Opinion That The Cost Of Cable Television Is Excessive

One of the most important concerns of this Court in its prior decisions on differential taxation of media speakers has been the potential for such taxes to be used for censorial purposes. Such a purpose is overtly present in the property taxation of cable operators in Orange County.

Prior to 1989, the Orange County Assessor's Office assessed a cable television company's taxable, tangible property by determining its original cost and the year of acquisition and then depreciating this taxable property to determine its present value in light of its remaining use-

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[27] Relevant portions of this study are appended to this brief. Kagan Media Appraisals, Inc. ("KMA") is a Carmel, California based company specializing in the valuation of broadcast, cable television, and other media and entertainment businesses. Over the past 17 years KMA personnel have appraised nearly $17 billion of media properties. This KMA study was commissioned by CCTA.

ful life. The identical assessment method was applied to other businesses in Orange County that had both taxable and substantial intangible property.

Beginning in 1989, however, the Assessor's Office adopted a radical new method for valuing cable television tangible property which has been called the "unitary method." In essence, the unitary method includes a cable operator's non-taxable, intangible property.[28] Application of the unitary method had increased each cable system operator's property tax obligation by $1.50 to $2.50 per subscriber per month.

The unitary method is not used to assess other similarly-situated industries or businesses in Orange County. A study that compared the sales price or the fair market value to assessed value of similarly-situated businesses found the assessed value of non-media businesses in Orange County is 16% of estimated fair market value, and the assessed value of other media businesses besides cable is 28% of their estimated fair market value. In stark contrast, the assessed value of cable television systems was 168% of their estimated fair market value.[29]

The situation in Orange County has led to a virtual state of siege between the local cable operators and the county Assessor. Some cable companies were forced to

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[28] Under this method, a cable television system's tangible property is assessed by determining the value of the business as a whole including the business' taxable, tangible assets and the value of its non-taxable, intangible assets. The unitary method adopted by the Orange County Assessor ignores the quality, age, condition and the remaining useful life of a system's tangible property. For one company, American Cablesystems of California, this resulted in an annual increase in property taxes from 1988 to 1989 of 371%.

[29] Declaration of Judd C. Ostrom of Kagan Media Appraisals, Inc. in Opposition to Defendant's Demurrer, *Rancho Santa Margarita Cablevision v. Jacobs, et al.*, Case No. X-625669, Orange County Superior Court (filed July 20, 1990), at 5-6.

raise their rates to consumers in order to meet their new tax liabilities. At the same time, they filed appeals to the local Assessment Appeals Board.[30] The cable companies that raised rates explained to their subscribers that the cause for the rate increase was the Assessor's discriminatory reassessment, which had drastically increased the cable operators' tax burden. Subscribers then complained to the Orange County Board of Supervisors and other public officials about the new assessment method.

As a result of these complaints, the Assessor lashed out. He accused "Big Cable" of "violating campaign reform laws by lying to residents and using a monopoly to gouge customers with inflated rates,"[31] and filed meritless complaints at the California Fair Political Practices Commission and the Orange County District Attorney's Office.

The Assessor's own statements make clear that the Orange County cable operators are being taxed differently because they are disfavored members of the media. Moreover, the Assessor has publicly expressed his opinion that the cost of cable television service is excessive.[32]

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[30] Notably, in the first of these appeals, the Assessment Appeals Board specifically rejected the Assessor's unitary method because it subjected the cable operator's intangible assets to property taxation. *The Applications of American Television and Communications Corporation for Change in 1987, 1988 and 1989 Assessments* (Assessment Appeals Board No. 1 of the County of Orange, Nov. 2, 1990).

[31] "Assessor Says Cable TV Firms Lie, Gouge", *Los Angeles Times*, May 22, 1990 at B4. (*See* Appendix).

[32] Each of the affected Orange County cable operators filed Section 1983 civil rights actions in state court alleging violations of the First Amendment, Fourteenth Amendment, Commerce Clause and the Cable Act to enjoin their discriminatory assessments and to obtain damages from the Assessor and Orange County. *Rancho Santa Margarita Cablevision v. Jacobs, et al., supra* n.29 (refiled Oct. 31, 1990).

Such punitive taxation poses a danger to fundamental liberties that the First Amendment was intended to protect. The Assessor's judgment as to the value of cable television programming is implicitly a judgment as to its content. His attack on the cost of cable television is, however indirect, content-based.

The cable operators in Orange County have a legitimate basis to fear further retaliation by the Assessor should they either continue to object to discriminatory taxation, or choose to carry programming critical of the Assessor or his policies, or select programming he does not like, or price their product in a way he feels is inappropriate. This environment can have a chilling effect on cable television system operators' speech and may encourage self-censorship.

Application of the unitary method burdens the Orange County operators' ability to provide existing or future programming. Cable operators continue to seek to improve the quality as well as the quantity of their programming. To the extent that their disposable income must be committed to the payment of dramatically increased taxes, this restricts their future ability to purchase any additional programming without passing that expense on to subscribers. California cable operators caught in this web of discriminatory taxation will also be forced to allocate less funds to local origination and access programming, including the political speech most highly valued by our Constitution.

Discriminatory taxation of cable television system operators in California has had and will have other significant negative impacts on cable speech. The dramatically increased tax burden has reduced operators' cash flow and operating margins, thereby eliminating, deferring or reducing their ability to upgrade or improve equipment, facilities, programming or services or to adopt new technology.

Increases in taxes on cable television systems has required and will require those systems to increase the rates that they charge subscribers to defray additional expenses. Because of increased prices for cable services, the pace of new subscriptions has dropped, and the number of subscribers disconnecting their cable service, or choosing to drop one or more pay services, is up. Increased prices caused by new discriminatory tax assessments have thus adversely affected subscriber retention as well as acquisition, providing cable operators with less net revenues.

To the extent that the financial burden of discriminatory taxation defers or delays system upgrades, increases in system channel capacity that allow for more viewer choice will be retarded. This diminishes the possibility that such new channels as CAL-SPAN or the Orange County News-Channel will be carried. No other California First Amendment speakers are burdened by taxation in such a manner that reduces both the quantity of speech and diversity of expression.

C. Utility User Taxes Are Also Being Applied In A Discriminatory Manner To California Cable Operators

Utility user taxes are imposed on customers of California utilities, as well as on users of cable television.[33] These taxes are collected by the cable operator or utility and appear on the user's monthly bill.

Utility user taxes as applied to cable television customers in California range from a low of three percent to a high of ten percent. In general, these taxes are equal to those taxes applied to users of gas, electric, water, and telephone utilities.

This apparent consistency is deceiving since cable television companies are burdened by franchise fees on top of

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[33] The Cable Act makes it clear that cable is not a utility. 47 U.S.C. § 541(c) (Supp. 1990).

utility user taxes. No California city can by law charge a franchise fee for telephone utilities.[34] Water, gas and electric utilities are limited to a two percent maximum franchise fee (except for charter cities).[35] Thus the total local tax burden on cable television operators, adding franchise fees and utility user taxes, is far greater than on gas, electric, water, and telephone utilities.[36] And, no other First Amendment speakers are burdened by such taxation.

Moreover, in certain localities, gas, electric, water, and telephone utilities are charged a significantly lower utility user's tax than cable television operators. In Oroville, California, for example, cable television viewers are subject to a five percent utility users' tax. While telephone and water customers pay the same tax, customers of gas and electric utilities have a $150 exemption per month. Thus, while most residential purchasers of gas and electrical services pay no taxes on their monthly bills, cable

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[34] *Cf. Pacific Telephone and Telegraph Co. v. City and County of San Francisco*, 197 Cal. App.2d 133, 17 Cal. Rptr. 687 (1961).

[35] Cal. Pub. Util. Code §§ 6006, 6205, 6231 (West 1965 and Supp. 1990).

[36] Discriminatory taxation of cable operators by taxes not of general application also violates the Cable Act to the extent that such taxation, when added to franchise fees, rises to a level of more than five percent of a system operator's gross revenues. 47 U.S.C. § 542(b) (Supp. 1990). The Cable Act preempts state law to the extent state action violates its purposes. *City of New York v. FCC*, 486 U.S. 57 (1988). The Cable Act's basic purpose in placing limitations on state actions is to "promote competition in cable communications and minimize unnecessary regulation that would impose an undue economic burden on cable systems." 47 U.S.C. § 521(6) (Supp. 1990). Congress apparently believed that franchise fees of above five percent would impose an undue economic burden on cable operators. Discriminatory taxation in any form—sales tax, utility user tax, or property tax—of such a magnitude is unconstitutional under the Supremacy Clause. U.S. Const. art. 6, cl.2.

television users are subject to a five percent tax on their total bill.[37]

Discrimination with respect to the utility user's tax is even greater in Pasadena, California. There, cable television subscribers pay a utility user tax of 8.92 percent as compared to a utility user tax on water and electricity customers of 7 percent, gas of 7.58 percent, and telephone of 7.86 percent.[38] Thus Pasadena cable subscribers pay over one percent higher utility user taxes than purchasers of any other service.

Since these taxes appear on cable company bills, they add to the total perceived cost of cable service, and deter customers from subscribing to cable service. Thus utility user taxes inhibit the dissemination by cable operators of speech as surely as a direct tax on cable operator revenues.

A Sacramento, California cable operator has sued the city with respect to its utility user tax on the basis that it is unconstitutional under the First Amendment. In granting the city's motion for summary judgment the city tax was upheld as constitutional,[39] but the case is now on appeal.[40] Thus the question of the constitutionality of discriminatory utility user taxes placed on cable television users is pending in the California courts and could be affected by this Court's decision.

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[37] Oroville, Cal., Code art. VII, §§ 24-127 to 143. (Exemptions appear at § 24-131.1).

[38] Pasadena, Cal. Ordinances 4.56.030 (telephone tax), 4.56.040 (electricity), 4.56.050 (gas), 4.56.060 (water), 4.56.070 (cable television).

[39] *Sacramento Cable Television v. City of Sacramento*, Case No. 510433, Sacramento Superior Court (December 28, 1989).

[40] *Id.*, Case No. 3 CIVIL C008372 (Ct. of App. 3d Dist., filed Feb. 20, 1990).

CONCLUSION

The cumulative effect of these discriminatory assessment and taxation policies in California is oppressive. In some markets, the combination of a cable operator's franchise fee of five percent of gross revenues, property taxation under discriminatory valuation of intangibles, and a utility user's tax at a higher rate of up to 10 percent creates a tax burden of up to 25 percent of gross revenues per month. This means that almost 25 percent of each cable subscriber's monthly bill, or a quarter of a system operator's gross revenues, must be dedicated to taxation, much of which is imposed on a discriminatory basis against cable operators.

At the same time, many of cable's competitors in the electronic media, such as over the air broadcasters, satellite master antenna systems, microwave distribution systems, or direct broadcast satellites, and its competitors in the print media, such as newspapers and magazines, pay no franchise fee, no utility user tax, and are not subject to the same discrimination in property taxation. This has a direct and immediate adverse impact on the First Amendment rights of cable operators and subscribers.

CCTA has demonstrated that the dangers inherent in discriminatory taxation of communications media extend beyond print. California represents an area where discriminatory taxation of cable television has been used for the very purpose this Court has feared. CCTA therefore urges the Court to find that the dangers of discriminatory taxation are equally applicable to cable television and to indicate clearly in its decision that any form of discriminatory taxation of cable television unsupported by a valid governmental purpose other than the raising of revenue is unconstitutional.

Respectfully submitted,

SPENCER R. KAITZ
President
ALAN J. GARDNER
Vice President
Regulatory & Legal Affairs
CARRINGTON F. PHILLIP
Assistant General Counsel
JEFFREY SINSHEIMER
Director of Regulatory Affairs
CALIFORNIA CABLE TELEVISION
ASSOCIATION
4341 Piedmont Avenue
P.O. Box 11080
Oakland, California 94611
(415) 428-2225

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FRANK W. LLOYD, III *
DIANE B. BURSTEIN
CAROLINE O. ROBERTS
MINTZ, LEVIN, COHN,
FERRIS, GLOVSKY &
POPEO, P.C.
1825 Eye Street, N.W.
Suite 1200
Washington, D.C. 20006
(202) 293-0500
Counsel for Amicus Curiae
California Cable
Television Association

* Counsel of Record